Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-970

ATTILIO AGNELLINO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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No.

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STATE OF NEW JERSEY,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Attilio Angellino, your Petitioner, prays that a Writ of Certiorari issue to review the order of the Supreme Court of New Jersey entered in the above-entitled cause on November 16, 1971.

Opinion Below

The order of the Supreme Court of New Jersey denying a Petition for Certification to the Appellate Division, Superior Court of New Jersey was entered herein without

opinion on November 16, 1971. It is reported in 59 N. J. 434, 283 A. 2d 533 (1971) and is reprinted at p. 1a of the Appendix hereto.

The *per curiam* opinion of the Appellate Division, Superior Court of New Jersey, entered herein on September 29, 1971, has not been reported. It is reprinted at pp. 2a-11a of the Appendix hereto.

The letter opinion of the Honorable Clarkson S. Fisher, (then) J.S.C., denying, on June 10, 1968, defendant's pretrial motion to suppress evidence, has not been reported. It is reprinted at pp. 12a-22a of the Appendix hereto.

Jurisdiction

1. The judgment of the Supreme Court of New Jersey was entered on November 16, 1971 and is final by its terms.

2. No application for rehearing or for an extension of time within which to petition for certiorari has been applied for, granted or denied.

3. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

Questions Presented

1. In summation to a jury in a criminal trial, may a state prosecutor comment upon the silence of a defendant during custodial interrogation, especially where at the time of arrest the defendant was rendered the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966)?

2. Is a search reasonable that is made pursuant to a search warrant based upon the unsworn, unsubstantiated hearsay of an arrested felon?

3. If an arrested felon give a statement to the police implicating a suspect in the commission of a crime, may a search warrant reasonably issue commanding the search of some or all of the business enterprises owned by that suspect, irrespective of whether the several business enterprises were said by the felon to have been involved in or connected with the alleged crime?

Constitutional Provisions Involved

1. The Fourth Amendment to the Constitution of the United States: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . ."

2. The Fifth Amendment to the Constitution of the United States: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

3. The Sixth Amendment to the Constitution of the United States: "In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense."

4. The Fourteenth Amendment to the Constitution of the United States: ". . . No State shall . . . deprive any person life, liberty, or property, without due process of law. . . ."

Statement of the Case

General:

This is an appeal in a criminal case from a judgment of conviction on two counts of receiving stolen property contrary to the provisions of N.J.S. 2A:139-1 (T258-10 to 15).*

Defendant was charged with and convicted of possessing two rolls of stolen Ozite carpeting (T258-10 to 12) and three stolen Frigidaire Air Conditioners (T258-3 to 10).

On November 30, 1967, two warrants were issue commanding the New Jersey State Police to search two premises in Long Branch, New Jersey, to wit, the Paddock Lounge and Jazz City (27a-28a; 32a-33a). The former was owned (25a) and the latter was leased (30a) by the defendant. Pursuant to the above, the named articles were seized on December 1, 1967 from premises known as the Paddock Lounge (T90-17 to 20). The Paddock is a restaurant and bar located at 46 Chelsea Avenue, Long Branch, New Jersey, and is comprised of a bar area, dining area and kitchen (T32-21 to 25). Above the restaurant is located a rooming house containing eighteen rooms and five apartments (T189-25 to T190-5). An exterior door in the kitchen leads to a shed outside and to the rear of the main two-story building (T32-25 to T33-8). The subject articles were found in this shed by agents of the New Jersey State Police in a search which began on November 30, 1967 and resumed on December 1, 1967 (T31-22 to 25; T34-17 to 20; T90-3 to 20).

At the time of these events, the defendant was President of the corporation which operated the restaurant

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* The reference "T" refers to the Transcript of the trial herein.

(T178-21 to 25). He was in charge of all purchases for the corporation, including equipment, fixtures and supplies (T179-7 to 10).

Issue of comment by prosecutor on defendant's silence at the time of arrest:

At the trial, defendant admitted constructive possession of the carpeting and air conditioners (T181-21 to 25; T192-19 to 23; T186-21 to 25). He had purchased the air conditioners toward the end of October 1967 (T186-10 to 13) from Metropolitan Air Conditioning (T186-1), an appliance store located in Krauser's Lumber Yard in Fords, New Jersey (T186-1 to 9). He paid $175 each and expected to pay $50 apiece for installation to one Bill Gordon, owner of Metropolitan (T186-17 to 19; T184-20 to 21). The defendant had met Gordon at the Paddock during the fall of 1967 (T184-15 to 21). He had received a receipt for the purchase of the air conditioners (T188-24 to 25) and placed it in a desk drawer of the office in the Paddock (T189-10 to 11). In the confusion following the police search of the premises, defendant was unable to locate the receipt (T189-1 to 18).

As indicated, the search warrant was executed and defendant was arrested on November 30, 1967. Immediately upon his arrest, the arresting officer rendered the *Miranda* warnings to defendant. Shortly thereafter, defendant "was questioned about the Frigidaire air conditioners. He stated that he paid about $150 I believe was his reply" (T88-21 to 23). He was not asked where or from whom he purchased the air conditioners and did not volunteer that information.

The defendant saw Bill Gordon, the man from whom he had purchased the air conditioners, approximately two months after his arrest (T187-1 to 6; T197-1 to 16). Subsequent efforts to locate Gordon by defendant (T187-6 to 10) and a private investigator who testified below (T200 to T203) were unsuccessful.

The issue raised here was brought to a head by the Prosecutor during his summation. In discussing the defense with respect to the purchase of air conditioners, the Prosecutor said (T212-20 to T213-13):

> "Now, you take Mr. Agnellino's story. And you consider the logic of the story. Start right off the bat the night of the raid, the police come, Lt. King and I forget the number, you may recall it, a number of police officers are on the scene. They go into the shed.
>
> * * *
>
> "And there's an indication they [police] are looking for stolen property. Logically, what would a normal human being do in that situation? I know what you would do and you know what I would do. I'd say wait a minute, let's find Bill Gordon, that's where I got those air conditioners from, let's find the interior decorator in Camden.
>
> We have none of that in this case. Here it is 1970—."

Objection was immediately noted (T213-14 to T214-2) on the ground that no defendant should be penalized for taking shelter in his constitutional right to remain silent, especially where the police have supposedly given the *Miranda* warnings. The trial court ruled the remarks to be "fair comment" (T214-6) and permitted the Prosecutor to to continue as follows (T214-9 to 16):

> "So I was saying is assessing Mr. Agnellino, I think you have a right to say that to yourself. Well, what would a normal human being do when the police are there? There's a raid going on and the property apparently has been stolen and it just doesn't ring true, this man if he didn't have some guilty knowledge wouldn't have done that. And that's what you're looking for in this case."

Defendant's objections to these comments by the Prosecutor have been preserved through the Appellate process leading to this Petition. The issue was raised and argued as Point IV in defendant's brief in the Appellate Division, Superior Court of New Jersey and was disposed of adversely to defendant by that court (7a-8a). The issue was further raised as Point C in the Petition for Certification filed by defendant in the Supreme Court of New Jersey, which was denied on November 16, 1971 (1a).

Issue of search & seizure:

On November 30, 1967, Detective Walter Y. King of the New Jersey State Police applied to Stanley Cohen, Magistrate, City of Long Branch, for the issuance of a warrant to search the Paddock Lounge for stolen television sets (24a-26a). He based his belief that probable cause for the search existed upon two grounds: (1) he received information from a source that was neither named nor described that the defendant owned and operated the premises (25a-26a); (2) he received information from a person arrested for receiving stolen television sets that that person had gotten the sets from the defendant and another at a gasoline station in Long Branch (26a). At 8:02 P.M. on November 30, and on the foregoing facts, Judge Cohen issued a warrant to search the Paddock (27a-28a).

On the basis of the very same facts (30a-31a) and with the inclusion of the receipt of information that defendant was the lessee of premises known as Jazz City (30a) (also located in Long Branch), Judge Cohen, at 7:58 P.M., issued a warrant to search Jazz City for the same television sets (32a-33a).

The warrant for the Paddock was executed at approximately 8:50 P.M. on November 30, 1967 (T32-11). The search continued until close to midnight (T90-8 to 9), at which point the officers secured the premises (T89-21 to 23) and left to conduct the search at Jazz City (T66-21 to T67-3). They subsequently returned to seize the evidence which became the subject matter of this case (T90-12 to 20).

Defendant's objections to the search and seizure herein were presented and preserved in the record of this cause as follows. A pretrial motion to suppress evidence was denied by The Honorable Clarkson S. Fisher, J.S.C., by order of May 21, 1968 (23a). The reasons for the denial are set forth in Judge Fisher's letter opinion of June 10 (12a to 22a). The issue was presented and argued as Points I and II of defendant's brief in the Appellate Division, Superior Court of New Jersey and was disposed of by that court adversely to the defendant (3a to 5a). The issue was again presented to the Supreme Court of New Jersey as Points A and B in defendant's Petition for Certification.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted to permit this Court to decide the much contested issue of whether a prosecutor may, during summation in a criminal trial, comment upon the silence of an accused at the time of his arrest.

During his summation, the Prosecutor below sought to "punish" the defendant because he took shelter in a constitutional right at the time of his arrest, i.e., he did not volunteer to the arresting officers certain aspects of the defense that would ultimately be brought forth at trial. The defendant did not gratuitously offer the name and address of the person from whom he purchased the subject air conditioners, nor did he volunteer the date and time when the purchase was made. Of course, just prior to his failure to volunteer this information, the defendant had been advised by the arresting officers that he did not have to say anything to them, but this warning was of little moment to the courts below.

It is and has been the defendant's position that the course pursued by the Prosecutor and sanctioned by the New Jersey courts is one of grave and fundamental constitutional error. The issue was highlighted by Mr. Justice Black in his concurring opinion in *Grunewald* v. *United States*, 353 U. S. 391, 425-426 (1957):

> "I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under

> the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution."

The concept of that concurring opinion eventually found its way into the majority opinion of this Court in *Miranda* v. *Arizona*, 384 U. S. 436, 468, n. 37 (1966):

> "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.*" (Emphasis added).

It is very difficult to conceive of language much clearer than that from *Miranda*. Yet, the defendant herein was "penalized" because he "stood mute" in the "face of accusation", i.e., when he was arrested.

It simply does not seem fair to sanction a procedure where, as here, a defendant is told at the time of his arrest that he need not say anything and is subsequently punished for not saying anything. Guilt inferred from silence during custodial interrogation should be as constitutionally impermissible as guilt inferred from silence during a trial, i.e., from the defendant's refusal to take the stand in his defense. However, the New Jersey courts hold that unfairness to be somehow ameliorated when a defendant takes the witness stand in a criminal trial. By taking the stand at the trial, he somehow waives his right to silence at the time of his arrest, while the prosecutor acquires the right to connote silence with guilt on the theory of what the "normal innocent human being" would do in like circumstances (8a; *State* v. *Burt*, 107 N. J.

Super. 390, 393, 258 A. 2d 711, 713 (App. Div. 1969) aff'd *o.b.* 59 N. J. 156, 279 A. 2d 850 (1971).

This analysis is hardly satisfactory. Its acceptance means that in New Jersey, a person, without legal counsel and in the pressure-packed atmosphere of an arrest, must not only decide what it is that he will say or not say to the officer who is arresting him, but must also decide whether or not he will want to testify in his own behalf at some vaguely defined criminal trial that looms in the distant future. Thus, his decision to speak or not to speak at the time of his arrest may very well determine whether he can later take the witness stand in his own defense. The whole thrust of the development of the law surrounding right to counsel and privilege against self-incrimination indicates that those are the very kind of decisions no layman should be forced to make at the time of his arrest.

The state of the case law in New Jersey on the issue raised here is very clear and the issue is squarely framed for decision by this Court. See, *State* v. *Burt, supra,* relied upon by the lower court here (8a). The issue is also one of great currency and has engendered conflicting decisions in several of the jurisdictions. As in New Jersey, a prosecutor may, during his summation and/or cross-examination of the defendant, make an issue of defendant's silence at the time of his arrest in the Eighth Circuit—*United States* v. *Briddle*, 443 F. 2d 443, 448 (8th Cir. 1971) (Witness' testimony as to defendant's silence during custodial interrogation as well as comment by prosecutor during summation); the Fifth Circuit—*Sharp* v. *United States*, 410 F. 2d 969, 970-971 (5th Cir. 1969) (Cross-examination of defendant with respect to his silence at the time of arrest; strong dissent by Brown,

C.J.); the Fourth Circuit—*United States* v. *White*, 377 F. 2d 908 (4th Cir.), *cert. denied*, 389 U. S. 884 (1967) (Controversy centered around comment when defendant refused to testify at earlier trial. Holding affected by "doctrine of invited error" and trial court's cautionary instruction. *Id.*, at p. 911); Arizona—*State* v. *Zappia*, 8 Ariz. App. 549, 448 P. 2d 119, *cert. denied*, *Zappia* v. *Arizona*, 396 U. S. 861 (1969) (Cross-examination of defendant with respect to his silence during custodial interrogation); Mississippi—*May* v. *State*, 211 So. 2d 845, 846 (Sup. Ct. Miss. 1968) (Cross-examination of defendant and testimony of officer with respect to defendant's silence during custodial interrogation); Ohio—*State* v. *Lasker*, 21 Ohio St. 2d 187, 257 N. E. 2d 65, 68 (Sup. Ct. Ohio 1970) (Cross-examination of defendant with respect to his silence during custodial interrogation).

On the other hand, a prosecutor may *not*, on summation or on cross-examination of a defendant, make an issue of his silence at the time of his arrest in the Tenth Federal Circuit—*United States* v. *Arnold*, 425 F. 2d 205, 205-206 (10th Cir. 1970) (Comment by prosecutor during summation on defendant's silence during custodial interrogation. *Held*: reversible error although not raised below); *United States* v. *Nolan*, 416 F. 2d 588, 594 (10th Cir.), *cert. denied*, 396 U. S. 912 (1969) (Comment by prosecutor during summation on defendant's failure to make exculpatory statement during custodial interrogation. *Held*: plain error although not objected to below); the Ninth Circuit—*Mendez* v. *United States*, 429 F. 2d 124, 126-127 (9th Cir. 1970) (Testimony by police officer that defendant remained silent when accused by co-defendant during custodial interrogation assumed to be improper (*id.*, at p. 127), but held to be harmless error, especially in view of trial court's cautionary instruction); *Cockrell* v.

Oberhauser, 413 F. 2d 256, 257 (9th Cir. 1969) (Officer's testimony that defendant stood silent during custodial interrogation when co-defendant confessed and accused defendant); *Fowle* v. *United States*, 410 F. 2d 48 (9th Cir. 1969) (Cross-examination of defendant with respect to his silence during custodial interrogation as well as comment during summation by prosecutor); the Seventh Circuit—*United States* v. *Matos*, 444 F. 2d 1071 (7th Cir. 1971) (Officer's testimony as to defendant's silence during custodial interrogation); *United States* v. *Kroslack*, 426 F. 2d 1129 (7th Cir. 1970) (Officer's testimony as to defendant's silence during custodial interrogation); the Sixth Circuit—*United States* v. *Brinson*, 411 F. 2d 1057 (6th Cir. 1969) (Cross-examination of defendant and summation by prosecutor concerning whether defendant had revealed his defense to FBI agent during interrogation); *United States* v. *McKinney*, 379 F. 2d 289 (6th Cir. 1967) (Testimony by officer as to defendant's silence during custodial interrogation when accused by co-defendant); the Third Circuit—*United States* v. *Brierly*, 384 F. 2d 992 (3rd Cir. 1967) (Testimony by officer as to defendant's silence during custodial interrogation when accused by co-defendants); the First Circuit—*Fagundes* v. *United States*, 340 F. 2d 673 (1st Cir. 1965) (Cross-examination of defendant with respect to his silence during custodial interrogation); the District of Columbia Circuit—*Gillison* v. *United States*, 130 U. S. App. D. C. 215, 399 F. 2d 586 (D. C. Cir. 1968) (Cross-examination of defendant with respect to his silence during custodial interrogation); the Eastern District of Virginia—*Hunt* v. *Cox*, 312 F. Supp. 637 (E. D. Va. 1970) (Comment by prosecutor during summation on defendant's silence during custodial interrogation); the Southern District of New York—*United States ex rel Young* v. *Follette*, 308

F. Supp. 670 (S. D. N. Y. 1970) (Cross-examination of defendant as to his silence during custodial interrogation held improper (*id.*, at p. 672), but harmless error (*id.*, at pp. 672-673)); Colorado—*Johnson* v. *People*, —— Colo. ——, 473 P. 2d 974 (Sup. Ct. Colo. 1970) (Cross-examination of defendant with respect to his silence during custodial interrogation as well as comment by prosecutor during summation); Florida—*State* v. *Glasso*, 217 So. 2d 326, 330 (Sup. Ct. Fla. 1968) (Witness's testimony as to defendant's silence in the face of accusation during custodial interrogation held to be error (*id.*, at p. 330), but harmless. *Ibid*); *Jones* v. *State*, 200 So. 2d 574, 576 (Ct. App. Fla. 1967) (Officer's testimony as to defendant's silence in the face of accusation during custodial interrogation); Kansas—*State* v. *Bowman*, 204 Kan. 234, 236, 461 P. 2d 735, 736 (Sup. Ct. Kan. 1969); Missouri—*State* v. *Lamb*, 468 S. W. 2d 209 (Sup. Ct. Mo. 1971) (Proffered, not admitted, cross-examination as to defendant's silence during custodial interrogation held to be harmless error); New York—*People* v. *Christman*, 23 N. Y. 2d 429, 244 N. E. 2d 703, 297 N. Y. S. 2d 134 (Ct. App. 1969) (Comment during summation with respect to defendant's failure to supply police with alibi particulars during custodial interrogation); Ohio—*State* v. *Stephens*, 24 Ohio St. 2d 76, 80, 263 N. E. 2d 773, 776 (Ohio Sup. Ct. 1970) (Comment by prosecutor upon defendant's silence during custodial interrogation).

The issue has generated an intramural conflict in Michigan. Compare, *People* v. *Russell*, 27 Mich. App. 654, 183 N. W. 2d 845, 849-850 (1971) (Cross-examination of defendant with respect to his failure to tell police during custodial interrogation the version of the incident to which he testified at trial held not to be error) with *People* v. *Ralston*, 31 Mich. App. 200, 187 N. W. 2d 454,

456-458 (1971) (Introduction into evidence of statement by defendant invoking his right to silence during custodial interrogation held error), *People* v. *Williams*, 26 Mich. App. 218, 230, 182 N. W. 2d 347, 351-354 (1970) (Cross-examination of defendant with respect to his silence during custodial interrogation as well as comment by prosecutor during summation held error), *People* v. *Hicks*, 22 Mich. App. 446, 178 N. W. 2d 193 (1970) (Detective's testimony as to silence of defendant during custodial interrogation and cross-examination of defendant with respect thereto held error); *People* v. *Fry*, 17 Mich. App. 229, 169 N. W. 2d 168 (1969) (Comment by prosecutor during summation with respect to defendant's silence during custodial interrogation held to be error (*id.*, at pp. 170-171), but harmless (*id.*, at p. 171) and waived by absence of objection below (*Ibid.*)), *People* v. *Seales*, 16 Mich. App. 572, 168 N. W. 2d 428 (1969) (Cross-examination of defendant with respect to his failure to tell police during custodial interrogation the story he told at trial held error), and *People* v. *Giscondi*, 9 Mich. App. 289, 294, 156 N. W. 2d 601, 604 (1967) (Officer's testimony as to defendant's silence during custodial interrogation in the face of confession of and accusation by co-defendant.).

In sum, the Court should grant certiorari to consider an issue which is undoubtedly of substantial constitutional dimension, and which is also of great currency and has engendered a substantial conflict in the Federal and State jurisdictions which have considered it.

II. Certiorari should be granted to permit this Court to establish much needed guidelines in the area of use of hearsay in an application for a search warrant.

At issue here is the serious question of whether the privacy guaranteed to the citizens of this country by the Fourth Amendment stands at the mercy of the fearful ramblings of an arrested felon. The fact pattern of the search and seizure aspect of this case rests on the cusp of the factual patterns of the leading decisions of this Court in *Spinelli* v. *United States*, 393 U. S. 410 (1969) and *Aguilar* v. *Texas*, 378 U. S. 108 (1964), on the one hand, and *United States* v. *Harris*, —— U. S. ——, 29 L. Ed. 2d 723 (1971), on the other. In this respect, the instant matter can readily serve as a useful catalyst for a searching inquiry which will result in much-needed guidelines and direction in the area of search law.

Here, police officers applying for a search warrant told the issuing magistrate, by way of affidavit, that an unidentified felon arrested for receiving stolen property at an undisclosed time on an undisclosed date at an undisclosed location had himself told the police at an undisclosed time on an undisclosed date at an undisclosed location that he had received a stolen television set at an undisclosed time on an undisclosed date from the defendant Agnellino at a gas station in Long Branch, New Jersey. The circumstances surrounding the receipt of this information by the police were not transmitted to the magistrate and it is clear that the information was not given to the police under oath.

The foregoing is as fair a statement of the crucial facts of the application for the search warrant as can be made. And yet, those "facts" were held below to

be sufficient to authorize a search, not of the gas station and not simply of the person of the defendant, but of a bar and restaurant allegedly owned by the defendant *and* another restaurant allegedly leased by the defendant.

Affidavits for search warrants based in most part upon hearsay have become the overwhelming norm in the day-to-day processes of law enforcement. Long ago's "tipster" or yesterday's "stool pigeon" has become today's "reliable informant" and the lower courts have become proficient in dealing with the difficult problems posed by a process of applying for and obtaining search warrants by which no substantively important fact ever rests first-hand upon an oath.

That the affidavit for a search warrant herein is based upon hearsay is not, of course, dispositive. What is important is that the hearsay stands totally unsupported. In this respect, the affidavit can readily be run through the relevant authorities.

It is initially apparent that the application miserably fails to meet either aspect of the two-pronged test of *Aguilar* v. *Texas*, *supra*. Certainly, there is not even a suggestion to the issuing magistrate that the applicant believed the informant to be a "reliable" or "credible" person, much less a supplying of underlying facts to the magistrate from which he could reach his own reasoned decision on that issue. See, *Aguilar* v. *Texas*, *supra* (378 U. S., at pp. 114-115). With respect to the second prong of *Aguilar*, i.e., the assertion of sufficient underlying circumstances to enable the magistrate independently to judge of the validity of the informant's opinion that the sought for articles were located in the place to be searched (see, *Spinelli* v. *United States*, 393 U. S. 410, 413 (1969)), the informant here, the one with the

supposed personal knowledge, did not render such an opinion (24a to 26a).

Assuming the existence of an informant's tip that is "not sufficient to provide the basis for a finding of probable cause" (*id.*, at p. 418), i.e., does not meet the test of *Aguilar*, the affidavit should then be considered by a reviewing court within the framework of *Spinelli* v. *United States, supra.* That is, the court should

> "look to the other parts of the application . . . [to] find [something] alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed." *Id.*, at p. 418.

That exercise here is futile. There is simply nothing to "look to", other than the informant's report.

The highest court below to render an opinion did not analyze this case in terms of *Aguilar* or *Spinelli*. Sole reliance was placed upon *United States* v. *Harris*, —— U. S. ——, 29 L. Ed. 2d 723 (1971) (4a). Here, as there, the informant's tip was a declaration against penal interest (29 L. Ed. 2d, at p. 734) and this is a circumstance which must be given weight. There is, however, a substantial difference between giving something weight and making it independently dispositive. In *Harris*, the hearsay was given under oath (*id.*, at p. 729) to a law enforcement official who had knowledge of the suspect's reputation (*id.*, at p. 733) and concerned a subject whom the officer knew had previously been found to have been involved in the very offense which was the subject matter of the warrant application (*id.*, at p. 732). None of those elements exist in the present case to buttress the report of the informant.

Perhaps it is true that *United States* v. *Harris, supra,* stands for the proposition that an arrested felon has a license to independently cause an invasion of privacy of any person he chooses. If that is so, then this case presents a perfect opportunity to advise the bench and bar to that effect in a holding that will not be clouded by the buttressing factors that were present in the *Harris* factual complex. And, if that is so, then it is clearly desirable that such a principle be clearly stated, for it represents a valuable tool for law enforcement that is not yet clearly recognized as being available.

If it is not true that the hearsay report of an arrested criminal is sufficient, standing alone, to support an affidavit for a search warrant, then it would certainly be advantageous to settle the issue by a decision clearly directed to it. There is no more pressing search problem than that surrounding the use of hearsay in an application for a warrant and the factual pattern of this case rests at the core of that problem.

The instant case is a classic example of the investigative lethargy engendered by judicial sanction of the use of hearsay in affidavits for search warrants. The subject warrant does not even establish probable cause to believe that the suspect (i.e., defendant) owned or had any connection with the property to be searched. The applicant merely stated that "information was received" that defendant owned the premises (25a). Needless to say, this bare and anonymous hearsay is hardly sufficient to constitute a suspicion much less probable cause to believe that the defendant controlled the premises.

It is more than unfortunate that a high-ranking detective in the New Jersey State Police does not believe it necessary to check a tax record, local police file or even telephone book to establish ownership of premises whose

privacy is about to be violated. It is even more unfortunate that a "judicial officer" empowered to authorize invasions of privacy was similarly unconcerned. Some outer limits must be placed on the use of hearsay in applications for search warrants. This case provides an excellant medium for just such an exercise. By exercising jurisdiction herein, this Court cannot only correct the injustice visited upon the defendant, but can also move to clarify and settle some of the fundamental problems facing the bench and bar involved in the day-to-day administration of criminal justice.

CONCLUSION

For the foregoing reasons and based on the foregoing authorities, Petitioner respectfully requests this Court to grant the Petition for Certification to the Appellate Division, Superior Court of New Jersey.

Respectfully submitted,

ROBERT I. ANSELL,
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ANSCHELEWITZ, BARR, ANSELL & BONELLO,
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APPENDIX A

Order of Supreme Court of New Jersey Denying Petition for Certification

(Filed—November 16, 1971.)

SUPREME COURT OF NEW JERSEY
C-162 SEPTEMBER TERM 1971

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

ATTILIO AGNELLINO,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

PER CURIAM.

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 16th day of November, 1971.

IRVING B. ZEICHNER
Acting Clerk of the Supreme Court

APPENDIX B

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

DOCKET NO. A-1966-69

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

ATTILIO AGNELLINO,

Defendant-Appellant.

Argued September 13, 1971—Decided September 29, 1971.

Before JUDGES CONFORD, MATTHEWS and FRITZ.

On appeal from Monmouth County Court.

Mr. Robert I. Ansell argued the cause for appellant (*Messrs. Anschelewitz, Barr, Ansell & Bonello*, attorneys).

Mr. Edward Roy Rosen, Assistant Prosecutor, argued the cause for respondent (*Mr. Vincent P. Keuper*, Monmouth County Prosecutor, attorney).

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PER CURRIAM.

Defendant was convicted on two counts of receiving stolen property. One count related to several air conditioners; the other to several rolls of carpeting. The goods were found by the Long Branch police, pursuant to a search warrant authorizing search for allegedly stolen television sets in certain bar premises maintained by the defendant in Long Branch known as the Paddock Lounge.

We deal seriatim with the grounds of appeal argued.

1. *Alleged insufficiency of affidavit to procure search warrant.*

The question here presented is whether the following portion of Detective King's affidavit is adequate to establish probable cause that defendant had stolen the television sets:

> "Information was received from a person arrested for Receiving Stolen Property (one of the stolen Silvertone color television sets) that he did receive from Attillio Agnellino and a person called 'Nunzio', stolen Silvertone color television sets, at the Morris Ave. Esso Station, located at Morris and Chelsea Aves., Long Branch, N. J."

The affidavit also stated that information was received by Detective King that the Paddock Lounge and Restaurant was owned by defendant and that the stolen television sets were designated for shipment to various Sears Roebuck Stores in New Jersey and New York, with a further description of the values and model numbers of the sets and the fact that they were stolen by breaking and entering into a Pennsylvania Railroad freight car.

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We regard the quoted portion of the affidavit, in the context of the remainder thereof, as sufficient to establish probable cause. The admission against penal interest by a confessed receiver of stolen property has substantial probative weight. *United States v. Harris*, 29 L.Ed.2d 723, 734 (1971).

2. *No probable cause to believe the articles were in the place searched.*

We think it would be reasonable for the police to believe that the defendant would be more likely to keep a number of bulky items like color television sets, particularly if stolen, in a secreted area in his place of business, rather than in his home. A place of business would be more likely to have storage space suitable to keep such bulky articles.

3. *Deficiency of warrant for failure to indicate permitted hours of search.*

R. 3:5-5 provides, "The warrant must be executed within 10 days after its date during the hours fixed therein by the judge issuing it, unless for good cause shown the warrant provides for its execution at any time of day or night." The warrant contained no restriction as to the hours of execution. The search was conducted during the evening of November 30, 1967, between 9 P.M. and midnight, having been signed by the municipal magistrate at 8:02 P.M. that evening.

In rejecting the attack upon the warrant in this regard the trial court relied upon the provision in R. 3:3-7(d) prohibiting invalidation of warrants for "technical insufficiencies or irregularities." The defect here in question

was not a technical insufficiency or irregularity. The requirement for fixing the hours of a search is an important one designed to protect the privacy of the individual to be searched to the extent that the circumstances will permit. However, that requirement is not imbedded in the Fourth Amendment. It is a rule of court, departure from which will not invalidate the search, if what actually transpired was reasonable notwithstanding. The premises here searched was not a dwelling but a bar and restaurant open for business during the hours in question. Moreover, as the State points out, the warrant was issued at about 8 P.M. It is entirely reasonable to believe that it was intended by the issuing officer that it be executed forthwith as there would ordinarily be no point in seeking a search warrant in the evening unless it was proposed to make the search promptly thereafter. We therefore think that it was reasonable to execute the search that evening.

Finding no reason to invalidate the search on the basis of the foregoing objections we do not discuss the State's alternative argument that a warrantless search is permitted of licensed premises under N.J.S.A. 33:1-35.

4. *Alleged violation of Miranda in relation to absence of warnings.*

During the search of the subject premises one of the searching detectives asked the defendant, referring to the air conditioners, "Are they hot?" to which the defendant is alleged to have replied, "For that price I wouldn't be surprised", or something to that effect. Defendant argues that the elicitation of this response by the detective without a previous warning to him of his rights under the

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Miranda rule constitutes a violation of *Miranda* and that the response should not have been admitted in evidence. At defendant's request a *voir dire* was conducted before this admission was permitted to be heard by the jury. At the conclusion thereof the court held that the *Miranda* warnings were given.

Detective King testified that when he arrived at the premises he read to defendant both an arrest warrant and a search warrant and gave defendant the Miranda warnings. The alleged incriminating statement by the defendant was made some time later in the course of the search. The defendant vigoriously cross-examined Detective King on the alleged sequence of events by confronting him with testimony he had given at the preliminary hearing and before the Monmouth County Grand Jury. On those occasions the detective did not state that he arrested the defendant at the outset of the search and that he told defendant of his *Miranda* rights. The State points out that the detective was not questioned about the arrest or the giving of the warnings on the occasions relied upon by defendant and that there may have been some confusion in the detective's mind as to what defendant was arrested for.

The trial court found in favor of the State on this issue relying in part upon the inference that a State trooper knows when he has to give *Miranda* warnings and that it is therefore more likely true than not that King did give them as he testified at the trial.

On the whole of what was before the court we cannot say it erred in resolving the contested issue of fact in favor of the State.

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5. *The prosecutor's comment to the jury as to defendant's failure to give explanation when arrested.*

During the trial defendant explained his possession of air conditioners by saying that he purchased them for $175 each from a concern headed by one Bill Gordon whom he had met at the Paddock Lounge during the Fall of 1967. He had received a receipt but said that it was lost following the police search of the premises. There was testimony that Gordon could not be found before the trial.

The defendant explained his acquisition of the carpeting by testimony that he was informed by a carpet installer named Trester that a South Jersey dealer had an oversupply of such carpeting which could be obtained at a reasonable price. Defendant relied upon Trester's judgment, had the carpeting delivered to the lounge and paid the man $750 for six rolls of it, intending to use it in the rooming house above the restaurant. The seller of the carpeting was not produced at the trial.

During the summation the prosecutor said:

> "And there's an indication they [police] are looking for stolen property. Logically, what would a normal human being do in that situation? I know what you would do and you know what I would do. I'd say wait a minute, let's find Bill Gordon, that's where I got those air conditioners from, let's find the interior decorator in Camden. We have none of that in this case."

Defendant objected immediately on the ground that the comment violated defendant's constitutional right to re-

main silent. The court overruled the objection stating that the remarks were "fair comment".

It should be noted that the proofs are that the defendant did not remain silent when the air conditioners and carpeting were found but did make some sort of effort at explanation, although not in the detail he gave at the trial. He so admitted in his testimony. It can therefore be said that this is not a case where the defendant at the time of confrontation by the police chose to take refuge in his Fifth Amendment right to say nothing. However, even if the defendant had said nothing at all at the time of the initial confrontation with the police the argument he makes here would seem to have been rejected by the Supreme Court in its recent affirmance (July 27, 1971) on the opinion below, of Judge Sullivan's opinion for this Court in *State* v. *Burt*, 107 N. J. Super. 330 (App. Div. 1969). The same contention that is urged here was made there. In that case the defendant had said nothing at the time he was arrested after and at the scene of a killing but at the trial he testified that the killing was accidental. This court held that the defendant waived his right to remain silent on the subject matter when he took the witness stand and told his story that the shooting had been accidental. By doing so he subjected himself to cross-examination as to the credibility of his story.

A fortiori the present contention of defendant must be rejected.

6. *References in the Court's charge to the jury to the statute on receiving stolen goods.*

During its charge the court paraphrased the statutory provisions (N.J.S. 2A:139-1) concerning the inference

which the jury might draw of guilty knowledge from the fact of recent possession of the stolen goods. In doing so the trial court either disregarded or overlooked the advice of the Supreme Court in *State* v. *DiRienzo*, 53 N. J. 360, 382 (1969) that the court should omit reference to the statute in a receiving stolen goods case. See also *State* v. *Humphreys*, 54 N. J. 406, 415-416 (1969).

However, we find no reversible error. The adversions to the statutory inferences and defenses were carefully couched in language embodying substantially all of the admonitions laid down by the court in *DiRienzo* designed to protect the interests of the defendant in a receiving stolen goods case.

Nor do we find error in certain other objections to the charge asserted by defendant which need not be discussed.

7. The Court's failure to inform the jury as to whether certain testimony was in the case.

During its deliberations the jury sent out a question to the court as to whether the cartons in which the air conditioners were crated were labeled with the words "Fort Monmouth" or "Property of U. S. Government, Fort Monmouth" or something to that effect. The court conferred with counsel. The judge said he had no recollection that there was such testimony. The defense assured the judge that he was right. The prosecutor, on the other hand, while admitting that he had no recollection of such testimony, said that he could not be sure. The court therefore responded to the question by telling the jury that it must rely upon its own recollection as to whether or not there was any such testimony.

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We fail to find a mistaken exercise of the court's discretion in handling the matter. Some four witnesses had testified about the air conditioners, and the testimony of all of them would have had to be read back to be certain of a correct answer to the jury's question. The jury did not request a reading of the testimony of any witness, nor did the defendant. *Cf. State* v. *Wolf*, 44 N. J. 176, 185, 186 (1965).

8. *Whether there should have been an acquittal with respect to the count involving the carpeting.*

The defendant argues that the count with respect to receiving the carpeting should have been dismissed because the only evidence offered by the State implicating defendant was its possession by him without proving it was "recent". The law is that "recent possession" permits an inference of guilty knowledge. The statute N.J.S. 2A: 139-1 fixes the period as one year. But it is not an axiom that "recent" possession is an absolute prerequisite for a conviction.

The defendant argues that there is no evidence as to when the goods were stolen. The employee of the owner corporation, Hanson, testified "There was carpet represented as stolen out of the warehouse to the Newark Police Department * * * Once or twice, just prior to December." Subsequently, on cross-examination, the witness said he was not sure of the date when the carpet was reported stolen. This, however, is not necessarily inconsistent with his previous answer that the report of theft was "just prior to December". The search resulting in the finding of the carpeting in the possession of defendant took place the night of December 1, 1967.

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We think that the foregoing in totality sufficed to permit the jury to find that the owner was missing the carpeting, and that it therefore had been stolen shortly prior to December 1, 1967. This was recent in relation to the time it was found in the possession of the defendant.

Affirmed.

APPENDIX C

Opinion of the Honorable Clarkson S. Fisher, J. S. C., dated June 10, 1968

Rendered by The Honorable Clarkson S. Fisher, J.S.C.

Denying Motion to Suppress

Dated June 10, 1968

Hon. Vincent P. Keuper
Prosecutor, Monmouth County
Court House
Freehold, N. J.
Attention Mr. Yaccarino

Anschelewitz, Barr, Ansell & Bonello
Attorneys at Law
513 Bangs Avenue
Asbury Park, N. J.

Attention Mr. Robert Ansell

Gentlemen: In re State of New Jersey v. Attilio Agnellino.
Indictment No. 237-67.

The following is my letter opinion in the above entitled matter, the original of which has this day been filed in the Office of the Clerk of the Monmouth County Court.

Defendant has moved pursuant to R. R. 3:2A-6(a) for an order suppressing evidence obtained through a series of three searches conducted by State and local police officers on November 30, 1967 and December 1, 1967. These operations were conducted on three premises located in the City of Long Branch, New Jersey. The evidence seized, consisting of color television sets, carpets, room

air-conditioners and other items of merchandise, has formed the basis for an indictment for receiving stolen property in violation of N.J.S.A. 2A:139-1. Two of the searches were conducted pursuant to warrants issued by the Municipal Court of the City of Long Branch. The third search was conducted without a warrant upon a warehouse located at 350 Community Place in Long Branch.

The operations conducted with search warrants were directed at the Paddock Lounge and Restaurant, 45 Chelsea Avenue, Long Branch, and Jazz City on the corner of Ocean and Chelsea Avenues, Long Branch. The raid on Jazz City failed to uncover any contraband. Defendant has challenged the sufficiency of the affidavits upon which the issuing judge based his finding that probable cause existed for the belief that stolen property was present at the aforementioned premises.

Both affidavits were made by Detective 2nd Class Walter Y. King of the New Jersey State Police. The crux of the affidavits is that: "Information was received from a person arrested for Receiving Stolen Property (one of the stolen Silvertone color television sets) that he did receive from Atillio Agnellino and a person called 'Nunzio,' stolen Silvertone color television sets at the Morris Ave. Esso Station, located at Morris and Chelsea Avenues, Long Branch, N. J."

Defendant challenges the sufficiency of the affidavits on four grounds:

(1) the absence of probable cause for the issuance of the warrants,

(2) the names of the affiants do not appear within the search warrants,

(3) the warrants fail to specify the hour of day within which the warrants were to be executed, and

(4) the search of the Paddock Lounge was ineffectively executed to the prejudice of the defendant.

Any discussion of probable cause must be predicated upon a reference to the terms by which the words are defined. Courts have placed the *quantum* of evidence requisite for the existence of probable cause as lying somewhere between mere suspicion and proof beyond a reasonable doubt. *State* v. *Contursi*, 44 N. J. 422, 429-430 (1965); *State* v. *Burnett*, 42 N. J. 377, 387 (1964). The determination of probable cause must be drawn by a "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14, 68 S. Ct. 367, 369, 92 L. Ed. 436 (1948); *State* v. *Macri*, 39 N. J. 250, 257 (1963).

Defendant argues that pertinent information set out by the affiant was based upon needlessly extenuated hearsay which failed to adequately reveal to the issuing judge the underlying facts and circumstances upon which Detective King based his conclusion that stolen property could be found at the suspect premises. Hearsay information alone is insufficient unless it is coupled with circumstances which lend to it an aura of trustworthiness. *State* v. *Bussachio*, 39 N. J. 272, 275 (1963). The affidavit states that "Information was received from a person arrested for Receiving Stolen Property * * *," but fails to indicate who communicated this information to Detective King. However, a clear inference can be drawn that Detective King personally received this information directly from the informant.

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There is no representation in the affidavit concerning the reliability of the informant whose tip formed the basis for the search operation upon the Paddock Lounge. The issuing magistrate must have before him sufficient facts and circumstances surrounding the receipt of the information to make a determination concerning the reliability of the information. *Aguilar* v. *Texas*, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *State* v. *Macri*, *supra*, 39 N. J. at p. 262. The situation here is distinguishable from instances where a tip is received by telephone from an unknown informant or where reliance is placed upon the information of an informant that the police have used the success on previous occasions. Where an individual is arrested upon suspicion that he has committed a crime and he supplies information leading to the issuance of a search warrant, the police generally have not had prior dealings with this person as an informer. However, his cooperation with the police could militate in his favor or even result in his exoneration. Here, there was no indication in the affidavit that the defendant and the arrested informer were co-conspirators, but the allegations that both were suspected of receiving stolen property originally taken from the Pennsylvania Railroad Company and the incarcerated suspect's receipt of a color television set directly from the defendant, provided a basis upon which the issuing magistrate could conclude that the information received by the police was reliable. The arrested person would not have served his interest by supplying false information to the police after having been caught with stolen property. This is especially true where his veracity could be easily checked by normal police investigation procedures.

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Defendant urges that the affidavit fails to specify the circumstances of the informant's incarceration; there being no disclosure of the time, date, *situs*, or circumstances of the arrest. The facts surrounding the informant's arrest appear immaterial to the present inquiry because of the defendant has failed to demonstrate any staleness of the information received from the incarcerated suspect. There is nothing to indicate that the police neglected to follow up the informant's tip with a timely application for the search warrants. The crucial determination is whether probable cause existed as a result of the informant's tip at the time of the issuance and execution of the warrants. The fact that the warrants were executed within approximately one hour after their issuance would tend to obviate any possibility of an unreasonable delay in following up the informant's tip.

Defendant contends that the affidavits failed to show a connection between the suspect premises and the stolen color television set found in the possession of the unnamed informant. Before probable cause can arise there must be allegations establishing grounds for the belief that contraband may be located at suspect premises. *State* v. *Kline*, 42 N. J. 135 (1964). There were two links established between the defendant and the premises searched: the informer's admission of his receipt of the television set from the defendant and the proximity of the Chelsea Avenue Esso Station to the two taverns. It follows that defendant would have stolen property of the size bulk of television sets in reasonably close proximity to a point of distribution of the stolen goods. Defendant's ownership or possession of two buildings of sufficient size to hide large objects would tend to strengthen the suspicion that similar sets might be found at the suspect premises.

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There is no requirement that the issuing judge must be satisfied to a moral certainty that contraband can be found at a specific location. If there were such a requirement, police procedures for ferreting out the fruits of crime would be stalemated whenever a defendant has means of hiding stolen property in more than one location in the immediate area which is under his ownership or control.

All of the shortcomings in the affidavits which the defendant points out as defeating probable cause fail to detract from a total atmosphere of incriminating circumstances. *State* v. *Tanzola*, 83 N. J. Super. 40, 46 (App. Div. 1964). The intent of the Fourth Amendment of the United States Constitution is to prevent only unreasonable searches where no probable cause exists. *Elkins* v. *United States*, 364 U. S. 206, 222, 80 S. Ct. 1437, 1446, 4 L. Ed. 2d 1669 (1960). Detective King's affidavit has sufficient information to indicate a strong probability that contraband could be found on the suspect premises. The cumulative effect of the omissions in the affidavits does not defeat the overall impression of probable cause. In *United States* v. *Ventresca*, 380 U. S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965), Mr. Justice Goldberg observed:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion.

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> They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

Defendant's second ground is based upon the omission of the name of the affiant from the warrants. R.R. 3:2A-3 clearly provides that "It (the search warrant) shall state * * * the names of the persons whose affidavits or testimony have been taken in support thereof." In *King* v. *United States*, 282 F. 2d 208 (4 Cir. 1960) it was determined such an omission is fatally defective to the validity of a search warrant. *King* is distinguishable from the situation here because the Fourth Circuit case involved an affidavit sworn out by a private citizen using a fictitious name and it was never established either during a hearing on a motion to suppress evidence of the search or at the trial of the case who the affiant was. Here the affiant's identity is clearly established and he is available as a witness to the defendant for purposes of testing the validity of the warrants.

Our rules require that the executing law enforcement officers "shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken * * *." R.R. 3:2A-4. The apparent purpose of this requirement is to apprise the person aggrieved by a search and seizure operation of the identity of the person upon whose informa-

tion the officer's search is based so that the validity of the search can be later tested. This notice of the identity of the affiant can have no effect on whether or not the search will be executed. The officer who conducts the search is directed by the issuing judge to execute the warrant even where the warrent may be patently defective. The time that the identity of the affiant becomes important to the aggrieved party is upon his motion to quash the evidence seized as a result of the warrant's execution. Our rules make adequate provision for discovery of the application for search warrants. R.R. 3:2A-9. The person aggrieved by a search need only to look at the affidavit itself to determine the identity and the position of the affiant. Defendant has not been prejudiced by the omission of King's name from the search warrant.

Defendant's third ground for challenging the validity of the warrants is directed at the search conducted upon the Paddock Lounge at approximately 9:00 p.m. on November 30, 1967. There is no time specified in the warrants fixing the hours for their execution. Under R.R. 3:2A-4 "The warrant must be executed within 10 days after its date during the hours fixed therein by the judge issuing it, unless for good cause shown the warrant provides for its execution at any time of day or night." This requirement is couched in mandatory terms. The obvious intent of this rule is to prevent midnight storm trooper tactics which tend to harass the suspect rather than to serve any lawful purpose. From the face of the warrants it appears that the issuing judged signed them at 8:02 p.m. on the same day. The search of the Paddock Lounge was commenced approximately one hour later during the cocktail lounge's normal hours of operation. The search was undertaken upon an apparent

"fresh" finding of probable cause. The timeliness of the search obviated any undue prejudice to the defendant as operator of a public tavern open for business at the time the search was conducted. The omission of the hour for execution did not render the search unreasonable in light of the existing situation at the time of the issuance and execution of the warrants.

The absence of the affiant's name and the hour of execution are technicalities which our rules have provided for to preclude the possibility of unfairnes to a person aggrieved by a search and seizure operation, but, as expressed in R.R. 3:2A-10(b):

> "In the absence of bad faith, no search or seizure by virtue of a search warrant shall be deemed unlawful because of technical insufficiency or irregularities in the warrant or in the papers or proceedings to obtain it, or the execution of it."

Defendant's final argument is based upon an alleged abandonment of the search and seizure operation conducted upon the Paddock Lounge. He contends that the search was commenced at 9:00 p.m. on November 30, 1967 and abandoned at 11:00 p.m. on the same evening. The police left two officers outside the Paddock Lounge as guards. At 9:00 a.m. the next morning the search was allegedly resumed, though the record is silent on this. The return of the search warrant discloses that the officers had discovered great quantities of contraband at the tavern.

It is defendant's position that no more than one search may be made under a search warrant. *State* v. *Parsons*, 83 N. J. Super. 430, 447-448 (App. Div. 1964). Here there was no physical seizure of the contraband on the evening

of November 30, apparently because of the quantity, size and bulk of the material found and the unavailability of commercial trucks to haul away the material. The premises within which the contraband was contained never left the custody of law enforcement officers. The two guards posted at 11:00 p.m. vested in the State constructive possession of the premises and its contents until the police completed the removal phase of the operation.

There is no merit in the argument that two searches were conducted under the single warrant directed at the Paddock Lounge. The search of the tavern constituted one continuous transaction in the sense that the premises never left the custody of law enfrocement officers until physical seizure of the contraband was accomplished. The quantity size and bulk of the material found could not have been anticipated by the police. *Parsons, supra,* does not apply here because in that case there was a five day interval between an initial search and a subsequent search by law enforcement officers acting under a single warrant. Situations can be anticipated where arresting officers may require weeks or even months to completely search and inventory contraband found at suspect premises.

Even if the search were to be considered fatally defective for the reasons defendant urges upon the court, a warrantless search of a public tavern holding a retail liquor consumption license to sell alcoholic beverages invalid under N.J.S.A. 33:1-35. *State* v. *Zurawski,* 89 N. J. Super. 488 (App. Div. 1965). The statute is sufficiently broad to encompass searches by any law enforcement officer without a warrant.

A portion of the contraband discovered by the searching officers at the Paddock Lounge was located in a shed

type building immediately behind the bar and restaurant building. Defendant contends that the right of the State of New Jersey to search without a warrant does not extend to this adjacent out-building. However, under N.J.S.A. 33:1-1(e), which is the definition section of the intoxicating liquors statute, the "building" in which the licensed premises are housed is deemed to include appurtenances and out-buildings. Under N.J.S.A. 33:1-35 the powers of the state to search without a warrant extends to a "search of the premises * * *, of any building containing the same * * *."

The search and seizure operations conducted by the law enforcement officers upon Paddock Lounge and Jazz City are not unreasonable and the motions to suppress evidence of the fruits of these searches are denied.

APPENDIX D

Order Denying Motion to Suppress Property, dated May 21, 1968

This matter being opened to the Court on May 3, 1968 by Robert Ansell, Esquire, attorney for defendant Attillo Agnellino, and Thomas L. Yaccarino, Assistant Prosecutor, appearing for the State of New Jersey, on a motion to suppress property obtained with a search warrant; and

The Court having heard arguments of counsel and testimony of witnesses and examined briefs, and no good cause having been shown,

It is on this 21st day of May, 1968, ORDERED that defendant's motion to suppress property obtained with the search warrant is hereby denied.

/s/ CLARKSON S. FISHER, J. S. C.

APPENDIX E

Affidavit for Search Warrant for Paddock Lounge, dated November 30, 1967

IN THE MATTER OF:

APPLICATION FOR SEARCH WARRANT

To search a particular four story white stucco building with red and yellow brick front, with a large sign in front reading, Paddock, being the hotel, and adjoining one story white stucco building with red and yellow cement front, with a sign over the front entrance reading, Restaurant. Located at 46 Chelsea Ave., Long Branch, Monmouth County, State of New Jersey and known as the Paddock Lounge and Restaurant.

APPLICATION FOR SEARCH WARRANT
VERIFIED COMPLAINT

CITY OF LONG BRANCH AND
STATE OF NEW JERSEY

STATE OF NEW JERSEY)
) ss.
)

On the 30th. day of November, 1967, before me, the undersigned Judge of the Municipal Court, City of Long Branch, N.J., personally appeared Detective Walter Y. King, who being duly sworn on his oath according to Law deposes and says:

Appendix E

1. That he is a Detective Second Class in the Division of State Police, New Jersey Department of Law and Public Safety and that he is assigned to the Criminal Investigation Section, Troop "C", Princeton, N.J. That he has been a member of the New Jersey State Police for fifteen years.

2. That he has good reason to believe and does believe that stolen property, namely Sivlertone color television sets, have been received and are in the possession of Atillio Agnellino, at the Paddock Lounge and Restaurant, 46 Chelsea Ave., City of Long Branch, County of Monmouth, State of New Jersey, particularly described as a four story white stucco building, with red and yellow brick front, with large sign in front reading Paddock, being the hotel, and adjoining one story white stucco building, with red and yellow brick front, with sign over entrance reading Resturant. There has been and is now located certain stolen property in violation of the laws of the State of New Jersey to wit: Receiving and Possession of Stolen Property in violation of the provisions of the New Jersey Statute 2A:139-1, said property consisting of Silvertone color television sets.

3. The facts tending for establishing the grounds for this application and probable cause of the deponents belief that such grounds exist are as follows:

   A. Information was received by Detective Walter King of the New Jersey State Police, that the buildings known as the Paddock Lounge and Restaurant, 46 Chelsea Ave., Long Branch, N.J., are owned by Atillio Agnellino, of 48 Larch-

wood Ave., West Long Branch, N.J., and Lounge and Restaurant are operated by same.

B. Information was received from a person arrested for Receiving Stolen Property (one of the stolen Silvertone color television sets) that he did receive from Atillio Agnellino and a person called "Nunzio", stolen Silvertone color television sets, at the Morris Ave. Esso Station, located at Morris and Chelsea Aves., Long Branch, N.J.

C. The stolen television sets were designated for shipment to various Sears Roebuck Stores in New Jersey and New York. The television sets are described as being Silvertone All Channel Color Television Sets, Model number 8181, console models, retail value $581.95 each, stolen during a breaking and entering and larceny of a Pennsylvania freight car No. SSW 47143 at Pennsylvania Sub Station 40, Newark, N.J., sometime between 9:00 PM November 18, 1967 and 10:00 AM November 20, 1967.

Wherefore, deponent moves that Search Warrant may issue authorizing a search of the above premises for Silvertone All Channel Color Television Sets.

/s/ WALTER Y. KING
Det. 2/C Walter Y. King No. 1103
New Jersey State Police
C.I.S., Princeton, New Jersey

Subscribed and sworn before me
this 30th day of November, 1967
at 8 P.M.

/s/ STANLEY COHEN

APPENDIX F

Search Warrant for Paddock Lounge, dated November 30, 1967

MUNICIPAL COURT
CITY OF LONG BRANCH, NEW JERSEY

STATE OF NEW JERSEY }
CITY OF LONG BRANCH } ss.:

To: Any Law Enforcement Officer of the County of Monmouth, City of Long Branch.

Complaint on oath and in writing having been made before me, Judge of the Municipal Court, City of Long Branch, County of Monmouth, on this date by you, alleging that you have good reason to believe and do believe that in a certain premise within the City of Long Branch, County of Monmouth, State of New Jersey, to wit; a four story building and adjoining one story building known as the Paddock Lounge and Restaurant, located at 46 Chelsea Ave., City of Long Branch, County of Monmouth, State of New Jersey. The buildings more particularly described as a four story white stucco building with yellow and red brick front, with large sign in front reading Paddock, being the hotel, and adjoining one story white stucco building with red and yellow cement front, with a sign over the entrance reading Restaurant, there has been and is now located certain stolen property in violation of the laws of the State of New Jersey, to wit: Receiving and possessing stolen property, in violation of the provisions of the New Jersey Statute 2A:139-1, said stolen property consisting of Silvertone Color Television sets.

Appendix F

You are hereby commanded to enter and search with the necessary and proper assistance, the buildings herein above named for the property specified, and to take into your possession all such property specified which may be found in the said building to the end that same may be dealt with according to law.

You are further commanded to execute this warrant within ten days from issuance hereof and forthwith make a return thereof to me with your report of the execution of this warrant and a written inventory of the property seized hereunder by you.

Given and issued under my hand at 8:02 O'clock this 30th day of November, 1967

STANLEY COHEN

APPENDIX G

Affidavit for Search Warrant for Jazz City, dated November 30, 1967

IN THE MATTER

OF

APPLICATION FOR SEARCH WARRANT

To search a particular one story white stucco brick building with neon sign on front of building reading, Jazz City, located on the north west corner of Ocean and Chelsea Aves., City of Long Branch, County of Monmouth, State of New Jersey.

APPLICATION FOR SEARCH WARRANT
VERIFIED COMPLAINT

CITY OF LONG BRANCH AND)
STATE OF NEW JERSEY) ss.

STATE OF NEW JERSEY)
) ss.
)

On this 30th day of November, 1967, before me, the undersigned Judge of the Municipal Court, City of Long Branch, personally appeared Detective Walter Y. King who being duly sworn on his oath according to law deposes and says:

Appendix G

1. That he is a Detective Second Class in the New Jersey State Police. He is assigned to the Detective Bureau, C.I.S., Troop "C", Headquarters, Princeton, New Jersey. He has been a member of the New Jersey State Police for a period of fifteen years and has investigated burglaries and their related crimes while a member of the State Police.

2. That he has good reason to believe and does believe that stolen property, namely Silvertone color television sets have been received and are in the possession of Atillio Agnellino, of 48 Larchwood Ave., West Long Branch, N. J., in a one story white stucco building, with neon sign on front of building reading, Jazz City, located on the north west corner of Ocean and Chelsea Aves., City of Long Branch, Monmouth County, N. J. There has been and is now located certain stolen property in violation of the provisions of the New Jersey statute 2A:139-1, said property consisting of Silvertone color television sets.

3. The facts tending for establishing the grounds for this application and probable cause of the dependents belief that such grounds exist are as follows:

   A. Information was received by Detective Walter Y. King, of the New Jersey State Police, that the above described building known as Jazz City is owned by the J.A.C. Corp., 74 Ocean Ave., Long Branch, N. J., and is leased to one Atillio Agnellino, of 48 Larchwood Ave., West Long Branch, N. J.

   B. Information was received from a person arrested for Receiving Stolen Property (one of the stolen

Silvertone color television sets) that he did receive from one Atillio Agnellino, and a person called "Nunzio", stolen Silvertone color television sets at the Morris Ave. Esso Station, located at Morris and Chelsea Ave., Long Branch, N. J.

C. The stolen television sets were designated for shipment to various Sears Roebuck Stores in New Jersey and New York. The television sets are described as being Silvertone All Channel Color Television Sets, Model number 8181, console models, retail value of $581.95 each, stolen during a breaking, entering and larceny of a Pennsylvania freight car No. SSW 47143 at Pennsylvania Railroad Sub Station 40, Newark, New Jersey, sometime between 9:00 PM November 18, 1967 and 10:00 AM November 20, 1967.

Wherefore, deponent moves that search warrant may issue authorizing a search of the above premise for Silvertone All Channel Color Television Sets.

Det. 2/c /s/ Walter Y. King No. 1103
Detective Walter Y. King No. 1103
New Jersey State Police
C.I.S., Princeton, N. J.

Subscribed and sworn to
before me this 30 day of
November, 1967 at 7:55 PM

/s/ Stanley Cohen, Magistrate
Municipal Court
City of Long Branch, N. J.

APPENDIX H

Search Warrant for Jazz City, dated November 30, 1967

MUNICIPAL COURT
CITY OF LONG BRANCH
NEW JERSEY

STATE OF NEW JERSEY }
CITY OF LONG BRANCH } ss.:

To: Any Law Enforcement Officer of the County of Monmouth, City of Long Branch.

Complaint on oath and in writing having been made before me, Judge of the Municipal Court, City of Long Branch, County of Monmouth, on this date by you, alleging that you have good reason to believe and do believe that in a certain premise within the City of Long Branch, County of Monmouth, State of New Jersey, to wit: a one story white stucco, and brick building, located on the north west corner of Ocean Ave. and Chelsea Ave., City of Long Branch, County of Monmouth; State of New Jersey. The building more particularly described as having a neon sign on front of building reading Jazz City, there has been and is now located certain stolen property in violation of the laws of the State of New Jersey, to wit; Receiving and possessing stolen property, in violation of the provisions of the New Jersey Statute 2A:139-1, said stolen property consisting of Silvertone Color Television sets.

You are hereby commanded to enter and search with the necessary and proper assistance, the building herein above named for the property specified, and to take into

your possession all such property specified which may be found in the said building to the end that same may be dealt with according to law.

You are further commanded to executé this warrant within ten days from issuance hereof and forthwith make a return thereof to me with your report of the execution of this warrant and a written inventory of the property seized hereunder by you.

Given and issued under my hand at 7:58 o'clock this 30th day of November, 1967

STANLEY COHEN

SUPREME COURT, U. S.
FILED
MAY 13
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-970

ATTILIO AGNELLINO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

STATE'S BRIEF IN OPPOSITION

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FREDERICK J. KALMA,
Assistant Prosecutor,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-970

ATTILIO AGNELLINO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

STATE'S BRIEF IN OPPOSITION

Petitioner seeks a Writ of Certiorari to review the order of the Supreme Court of New Jersey entered on November 16, 1971, which denied a petition of Certification to the Appellate Division, Superior Court of New Jersey.

Opinion Below

The order of the Supreme Court of New Jersey was entered on November 16, 1971 and is reported in 59 N. J. 434, 283 A. 2d 533 (1971). The opinion appears in petitioner's appendix at page 1a.

The opinion and order of the Appellate Division, Superior Court of New Jersey was entered on September 29, 1971 and appears in petitioner's appendix at pages 2a through 11a.

The opinion of the Honorable Clarkson S. Fisher, U.S. D.J. (then J.S.C.), rendered in connection with the pretrial motion to suppress appears in petitioner's appendix at pages 12a through 22a.

Jurisdiction

Jurisdiction is invoked under 28 U.S.C., Section 1257 (3).

Questions Presented

1. Whether a prosecutor, in summation, may comment upon failure of a defendant to provide certain information to police officials at the time of his arrest, where the defendant gave certain information to the police at that time, and at trial, testified concerning additional information?

2. Whether a search warrant may issue based upon hearsay information supplied by a person arrested for the same crime?

3. Whether the business establishments of a person may be reasonably included in a search warrant where the suspected criminal activity is possession of stolen property?

Constitutional Provisions Involved

1. Fourth Amendment—search and seizure.
2. Fifth Amendment—right to remain silent.
3. Sixth Amendment—right to counsel.
4. Fourteenth Amendment—due process of law.

Statement of the Case

General:

Petitioner seeks a certiorari in a criminal case whereby he was convicted on two counts of receiving stolen property in violation of N.J.S. 2A:139-1 (T258-10 to 15).

On November 30, 1967, two search warrants were issued authorizing the New Jersey State Police to search two business establishments of defendant, to wit, the Paddock Lounge and Jazz City. As a result of the search of the Paddock Lounge, two rolls of stolen carpeting and three stolen Frigidaire air conditioners, among other things, were recovered (T34-17 to T35-5). The Paddock Lounge is a restaurant and bar with a rooming house and bar above, and exterior shed to the rear of the building (T32-21 to T33-8). The stolen articles were found in the shed (T34-17 to T35-5).

At the time of these events, the defendant was President of the corporation which operated the restaurant (T178-21 to 25).

Issue of the Prosecutor's Comment in Summation:

During the course of the search of the Paddock Lounge, Detective King of the New Jersey State Police advised the defendant of his *Miranda* rights (T39-9 to 19). When

the stolen articles were discovered, defendant was questioned concerning the same and he replied that he had purchased the air conditioners for $150.00 each (T40-24 to T41-2). Defendant was asked if the air conditioners were "hot" and defendant replied "for that price I wouldn't be surprised." (T41-2 to 5; T88-21 to 23; T98-18 to T99-25; T88-24 to T89-1). Concerning the carpeting, defendant stated that he had gotten a good buy on the rugs (T88-16 to 21).

At trial, defendant testified that he bought the air conditioners from one Bill Gordon, who was in the air conditioning business and operated a store called Metropolitan Air Conditioning (T184-11 to 21; T185-21 to T186-13). He paid $175.00 apiece for them (T186-15 to 20). Gordon did not testify at the trial.

During summation, the prosecutor concentrated on the issue of credibility. In connection with that, he stated the following:

> "Now, you take Mr. Agnellino's story. And you consider the logic of the story. Start right off the bat the night of the raid, the police come, Lieutenant King and I forget the number, you may recall it, a number of police officers are on the scene. They go into this shed.
>
> Now, I think you have a right to say to yourselves why are the windows boarded up on this shed? Secondly, say this stuff was coming into your shed and you had three air conditioners and six rolls of rugs. And there's an indication they are looking for stolen property. Logically, what would a normal human being do in that situation? I know what you would do and you know what I would do. I'd say wait a minute, let's find Bill Gordon, that's

where I got those air conditioners from, let's find the interior decorator in Camden.

We have none of that in this case. Here it is 1970—

Mr. Ansell: I hate to interrupt. I'd like to approach side bar.

The Court: All right, you may approach side bar.

(The following conversation was recorded at side bar out of the hearing of the jury.)

Mr. Ansell: The State has taken the position Lieutenant King walked up to Artie Agnellino and said "You don't have to say anything, anything you say can be used against you, you have a right to keep silent."

Now, the State wants to penalize Mr. Agnellino for staying silent. I suggest to the Court that is absolutely improper and unfair and absolutely no basis in the law for the Prosecutor making that kind of comment.

Mr. Smith: I disagree. Constantly Mr. Ansell told this jury this is the defendant's first opportunity.

The Court: I think it's fair comment.

(End of side bar conversation. The following was recorded in open court.)

Mr. Smith: So I was saying in assessing Mr. Agnellino, I think you have a right to say that to yourself. Well, what would a normal human being do when the police are there? There's a raid going on and the property apparently has been stolen and it just doesn't ring true, this man if he didn't have

some guilty knowledge wouldn't have done that. And that's what you're looking for in this case.

You can get over that hurdle of whether or not they are stolen pretty easily. The thing you're looking for is what was in his mind, what did he do, what was he aware of and we can't come in and open his head and say there it is, I can point to it. It's something you have to infer from the whole picture, the whole story here. You put those pieces in the puzzle." (T212-20 to T214-24)

The prosecutor then went on to discuss the concept of guilty knowledge and inferences which may be drawn from the facts.

On appeal, the issue concerning whether or not these comments were unfair was raised in both the Appellate Division, Superior Court of New Jersey, and the New Jersey Supreme Court.

Issue of Search and Seizure:

Detective Walter King of the New Jersey State Police made application for a search warrant to the Honorable Stanley Cohen, Magistrate of the City of Long Branch, for the issuance of a search warrant to search the Paddock Lounge for stolen television sets, on November 30, 1967 (Pa24-26). The affidavit set forth Detective King's belief that stolen Silvertone color television sets were located on the premises. The basis for this belief was stated as

1) that the Paddock Lounge was owned by defendant, 2) that information was received by a person arrested for possession of a Silvertone television set, that he had received the set from defendant and one "Nunzio" at a

gas station in Long Branch, and 3) that the sets were stolen from a railroad car in Newark, New Jersey sometime between 9:00 P.M. November 18, 1967 and 10:00 A. M. November 20, 1967 (Pa25 and 26). The warrant was issued by Judge Cohen at 8:02 P.M. on November 30, 1967 (Pa27 and 28). A warrant was also issued at this time to search the premises leased by defendant known as Jazz City (Pa32 and 33). The two premises were located a short distance from the gas station where the felon stated that he received the television, as noted by Judge Fisher in his opinion on the motion to suppress (Pa16).

The warrant for the Paddock Lounge was executed at approximately 8:50 P.M. on November 30, 1967 (T32-11). Search of the premises concluded shortly after midnight after the stolen items were discovered (T90-8 to 9). The premises was secured and the police subsequently returned and confiscated the stolen property (T90-7 to 20).

Motion to suppress the evidence as a result of an illegal search and seizure was held prior to trial, which motion was denied (Pa23). This issue was raised on appeal and presented to both the Appellate Division, Superior Court of New Jersey and the New Jersey Supreme Court.

Reasons for Denying the Writ

I.

The Prosecutor by way of summation, did not comment upon the defendant's right to remain silent, therefore, *certiorari* should be denied.

The State does not dispute the legal right of petitioner while he was in police custody to refrain from making any statements to the authorities, and if petitioner had

not taken the witness stand, nothing of his silence during custody could be brought out at trial. However, petitioner did make certain statements to the police after being advised of his rights under *Miranda* v. *Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and did take the witness stand at trial. Under these circumstances, must the State resignedly accept the account as testified at trial and must the State be denied the right to penerate and inquire into the plausibility and believability of the testimony simply because it comes from the defendant himself and not from a witness? The answer must be grounded in obvious common sense as well as law.

In *Raffel* v. *United States*, 271 U. S. 494, 46 S. Ct. 566, 70 L. Ed. 1154 (1925), the Court stated:

> "The immunity from giving testimony is one which the defendant may waive by offering himself as a witness . . . When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue . . . He may be examined for the purpose of impeaching his credibility . . . His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inference, and the jury may be so instructed . . . His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examinations may be inconvenient or embarrassing." (citations omitted.) 271 U. S. at p. 494.

Recently in *State* v. *Burt*, 107 N. J. Super. 390, 258 A. 2d 711 (App. Div. 1969), aff'd. o.b., 59 N. J. 156, 279 A. 2d 850 (1971), *certiorari* denied —— U. S. —— (1972),

(No. 71-5509), the New Jersey Appellate Division was concerned with comment upon a defendant's failure to tell the police the exculpatory version of the incident to which he testified at trial. Therein the Court held:

> "We conclude that no violation of defendant's Constitutional rights were involved. The thrust of the prosecutor's remarks were not that the defendant had remained silent after he had been arrested but rather that if the shooting had been accidental, as defendant claimed, the normal reaction would have been to so indicate to the police at the earliest opportunity. This was legitimate argument for the State to make.
>
> ". . . Defendant's failure to tell anybody at the time that the shooting of Owens was accidental was relevant to the issue of the credibility of his courtroom testimony and was permissible." (citations omitted). 107 N. J. Super. at p. 393.

The relevant portion of the Fifth Amendment consists of the following words: "No person . . . shall be compelled in any criminal case to be a witness against himself." No one compelled petitioner to speak to police upon his arrest. He took the witness stand voluntarily. The summation of the prosecutor was clearly intended to test the credibility of petitioner's testimony and no more. The rule of law that an accused in a criminal case shall not be compelled to be a witness against himself, should not be extended to produce the result that comment may not be made to test whether the story told on the witness stand was not given to the police earlier.

In *Harris* v. *New York*, 401 U. S. 222, 91 S. Ct. 643, 28 L. Ed. 2d (1971), the Court dealt with the admissibility of a statement by a defendant which had been obtained

by the police without first giving the requisite *Miranda* warnings. Therein, the Court ruled that the statement was admissible to impeach the credibility of the defendant who had given a different version of the crime at trial than he had given previously to the police.

Wherein lies the distinction between that which was said by the defendant at a prior occasion and that which was not said by a defendant when he chose to speak after advice of his rights? The privilege embodied in the Fifth Amendment should not be used as a shield to prevent comment upon conflicting or natural responses, when, in essence, a trial is truly a quest for the truth. Should a witness be shielded from obvious comments upon that which accords with human affairs because he is a defendant in a criminal action? The comments by the prosecutor were made within the scope of credibility of the testimony presented and were manifestly correct based upon the proofs adduced.

II.

The warrant in question was issued upon probable cause and *certiorari* should be denied.

Petitioner alleges that the warrant in question was not issued upon probable cause. The affidavit reflects that an individual was arrested for possession of a stolen Silvertone television set. This and other sets were stolen from the Newark railroad yard sometime between 9:00 P.M. on November 18, 1967 and 10:00 A.M. on November 20, 1967. The arrested felon stated that he received the set from petitioner at a gas station located on the corner of Morris and Chelsea Avenue, Long Branch, New Jersey (Pa25 and 26). As indicated by Judge Fisher, the prem-

ises of petitioner sought to be searched were only a short distance from this gas station (Pa16). The affidavit was made on November 30, 1967 and the warrant was issued on the same day. Therefore, the longest lapse of time between the receipt of the information and the application for the warrant would have been ten days.

When dealing with information received from a third person, the issuing magistrate must be presented with sufficient facts and surrounding circumstances which would indicate the reliability of the information received. *Aguilar* v. *Texas*, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *State* v. *Macri*, 39 N. J. 250, 188 —— A. 2d 389 —— (1963). Hearsay information must be coupled with circumstances which add an atmosphere of trustworthiness. *Spinelli* v. *United States*, 393 U. S. 410 (1969). However, when the information is received from an arrested felon, it constitutes an admission against penal interest and must be given substantial probative weight. *United States* v. *Harris*, —— U. S. —— 29 L. Ed. 2d 723 (1971).

In the case at bar, a person had been arrested for receiving a stolen television. He stated that he had received the set from petitioner. Petitioner's business premises were a short distance from the location of the transaction. Finally, a check revealed more than one set had been stolen from the Newark yard.

The State respectfully directs the Court's attention to *United States* v. *Ventresca*, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965), wherein Mr. Justice Goldberg stated:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract.

> If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." 380 U.S. at p. 102.

To what lengths are police officers, acting in the legitimate pursuit of their duties, expected to go? To what absurdities need the underlying facts and circumstances be carried? All searches and seizures must be viewed in the light of reasonableness under the facts and circumstances presented. What may be reasonable in one situation may be unreasonable in another. Here, the police officers acted reasonably based upon reliable information.

Concerning the issue of alleged failure to establish ownership of the premises, this point was not raised below and should not be included in the consideration of the issuance of the writ.

CONCLUSION

For the foregoing reasons and authorities cited in support thereof, the State respectfully submits that the Petition for Writ of *Certiorari* to the Appellate Division, Superior Court of New Jersey, be denied.

Respectfully submitted,

JAMES M. COLEMAN, JR.,
Monmouth County Prosecutor
Court House,
Freehold, New Jersey

FREDERICK J. KALMA,
Assistant County Prosecutor
Of Counsel and on the Brief.